

JUN 6 1984

ALEXANDER L. STEVAS,  
CLERK

NO. 83-1856

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

JAMES KENNETH SELVIDGE,  
*Petitioner,*  
v.  
STATE OF GEORGIA,  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

WILLIAM B. HILL, JR.  
Senior Assistant  
Attorney General  
*Counsel of Record for the  
Respondent*

MICHAEL J. BOWERS  
Attorney General

JAMES P. GOOGE, JR.  
Executive Assistant  
Attorney General

MARION O. GORDON  
First Assistant  
Attorney General

DENNIS R. DUNN  
Senior Attorney

132 State Judicial Bldg.  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334  
(404) 656-3359

QUESTION PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the Petitioner's allegations of alleged constitutional and evidentiary errors where the Supreme Court of Georgia did not address, under either federal or constitutional law, any of the allegations raised but instead decided the Petitioner's case solely as a question of state law?

i.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i.
STATEMENT OF THE CASE.....	1
REASONS FOR NOT GRANTING THE WRIT.	
A.    NO ISSUE IS PRESENTED FOR REVIEW BY THIS COURT BECAUSE THE SUPREME COURT OF GEORGIA IN THE INSTANT CASE DID NOT ADDRESS ANY OF THE ALLEGATIONS RAISED HEREIN UNDER EITHER FEDERAL OR CONSTITUTIONAL LAW, BUT INSTEAD DECIDED THE PETITIONER'S CASE SOLELY AS A QUESTION OF STATE LAW.....	4
	ii.

CONCLUSION..... 14

CERTIFICATE OF

SERVICE..... 16

## TABLE OF AUTHORITIES

<u>Cases cited:</u>	<u>Page(s)</u>
<u>Berea College v. Kentucky,</u> 211 U.S. 45 (1908).....	6
<u>Cardinale v. Louisiana,</u> 394 U.S. 437 (1969).....	5
<u>Fox Film Corp. v. Muller,</u> 296 U.S. 207 (1935).....	6
<u>Herb v. Pitcairn,</u> 324 U.S. 117 (1945).....	8
<u>Selvidge v. State,</u> 166 Ga. App. 80, 303 S.E.2d 294 (1983).....	2,10,12
<u>Selvidge v. State,</u> 252 Ga. 243, 313 S.E.2d 84 (1984).....	2,8
<u>Zacchini v. Scripps-Howard</u> <u>Broadcasting Company,</u> 433 U.S. 562 (1977).....	8

### Statutes Cited:

O.C.G.A. § 16-8-7; Ga. Code Ann. § 26-1806.....	2
O.C.G.A. § 24-4-8; Ga Code Ann. § 38-121.....	8

No. 83-1856

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

JAMES KENNETH SELVIDGE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF GEORGIA

---

BRIEF IN OPPOSITION FOR THE RESPONDENT

---

PART ONE

STATEMENT OF THE CASE

Petitioner, James Kenneth  
Selvidge, was convicted on two counts  
of theft by receiving stolen property,

a violation of O.C.G.A. § 16-8-7; Ga. Code Ann. § 26-1806. On appeal to the Court of Appeals for the State of Georgia, the Petitioner's convictions and sentences were confirmed at Selvidge v. State, 166 Ga. App. 80, 303 S.E.2d 294 (1983).

Petitioner then sought, and was granted, a writ of certiorari to the Supreme Court of Georgia, which upheld the Court of Appeals' affirmance of Petitioner's convictions. Selvidge v. State, 252 Ga. 243, 313 S.E.2d 84 (1984).

Petitioner now seeks a writ of certiorari from this Court to review the affirmance of his convictions and sentences by the Supreme Court of Georgia.

Further facts may be developed  
herein as necessary for a more  
thorough illumination of the issues  
presented to this Court for resolution.



PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. NO ISSUE IS PRESENTED  
FOR REVIEW BY THIS COURT  
BECAUSE THE SUPREME  
COURT OF GEORGIA IN THE  
INSTANT CASE DID NOT  
ADDRESS ANY OF THE  
ALLEGATIONS RAISED  
HEREIN UNDER EITHER  
FEDERAL OR  
CONSTITUTIONAL LAW, BUT  
INSTEAD DECIDED THE  
PETITIONER'S CASE SOLELY  
AS A QUESTION OF STATE  
LAW.

Petitioner contends that his Sixth  
and Fourteenth Amendment rights were  
violated during his trial, and that  
under Georgia law, insufficient

circumstantial evidence was presented to support his conviction. Respondent submits that no issue raised by the Petitioner was addressed by the Supreme Court of Georgia under either federal or constitutional law, but instead the Petitioner's case was decided solely as a question of state law.

It is a well-established principle of law that this Court will not decide federal or constitutional issues raised for the first time on review of a state court's decision. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Such questions not raised below are very likely to have an inadequate record, since it was certainly not compiled with those questions in mind and in the federal system it is very important that the

state courts be given the first opportunity to consider the application of state statutes in light of any constitutional challenge. Id. at 439.

Additionally, this Court has consistently adhered to a self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal or state ground, even though a federal question may be involved and perhaps wrongly decided.

Berea College v. Kentucky, 211 U.S.

45, 53 (1908); Fox Film Corp. v.

Muller, 296 U.S. 207 (1935). In

explanation of this policy, this Court has said:

The reason is so obvious that it has rarely been thought to warrant statement. It is

found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117,  
125-126 (1945); Zacchini v.  
Scripps-Howard Broadcasting Company,  
433 U.S. 562, 566 (1977).

In the instant case, the Supreme Court of Georgia, in its review of the Petitioner's case, limited its review solely to the question of whether the testimony of David Grant, the burglar of Breedlove's Store and the principal witness against the Petitioner on the "Breedlove's" count, required corroboration under O.C.G.A. § 24-4-8; Ga. Code Ann. § 38-121. Selvidge v. State, 252 Ga. 243, 244, 313 S.E.2d 84 (1984). This sole issue considered by the Supreme Court of Georgia, upon which the writ of certiorari is sought, is neither presented nor discussed in the instant petition. Additionally, the Supreme Court of

Georgia's decision regarding  
Petitioner's case was based solely on  
the court's interpretation of Georgia  
statutes, and did not identify or  
discuss any federal or constitutional  
issue.

Although the Petitioner did allege  
a violation of his Sixth Amendment  
right to confrontation of witnesses in  
his direct appeal to the Court of  
Appeals for the State of Georgia, this  
issue was not discussed by the Supreme  
Court of Georgia. The Court of  
Appeals for the State of Georgia did  
not address this issue under any  
federal or constitutional aspect, but  
instead stated:

There was no error in  
allowing impeaching testimony  
in a statement made by the  
witness Flowers to a police

officer which was inconsistent with what he reputably (sic) said to his grandmother in her in-court testimony, especially in the absence of an objection or motion to strike.

Selvidge v. State, 166 Ga. App. 80, 84, 303 S.E.2d 294 (1983). Not only had the Court of Appeals for the State of Georgia not addressed any federal issue in considering this alleged error, but it is also apparent that the court's interpretation of state law and trial procedure influenced its decision on this issue.

Regarding Petitioner's allegations that his Fourteenth Amendment rights were violated by the introduction of certain items into evidence, this issue was not raised in the context of

a constitutional violation in the Petitioner's direct appeal to the Court of Appeals for the State of Georgia. See Petitioner's Appendix O, page 68a, no. 2(f). This issue was not expressly addressed or decided by either the Court of Appeals or the Supreme Court of Georgia in their respective decisions.

Additionally, Petitioner's allegations that his co-conspirator's out of court statement was improperly used as circumstantial evidence against the Petitioner at his trial fails to raise any federal or constitutional issue. In his argument regarding said allegations, Petitioner fails to identify any federal or constitutional issue, but instead alleges violations of Georgia state law. See Petition for Writ of



Certiorari, pages 12-14. The Court of Appeals for the State of Georgia did not directly address this allegation, but instead generally stated that:

There is sufficient circumstantial evidence, as supported by other direct evidence, to warrant a jury finding of guilt beyond a reasonable doubt.

Selvidge v. State, 166 Ga. App. at 84. The Supreme Court of Georgia did not address this issue at all.

As both the Supreme Court and the Court of Appeals for the State of Georgia did not address any of the Petitioner's allegations raised herein in either a federal or constitutional context, but instead reviewed the Petitioner's allegations solely in light of adequate and independent

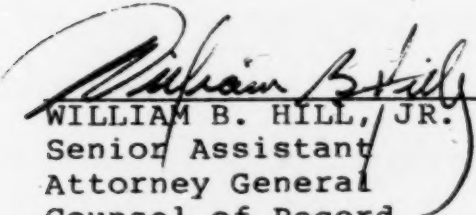
non-federal grounds, Respondent respectfully submits that the issues raised in the instant petition for certiorari are improperly developed and presented to this Court for review.

Therefore, for all of the above and foregoing reasons, Respondent asserts that Petitioner has failed to present any substantive issue of federal law which would warrant review by this Court.

## CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there exists no federal question for review by this Court as to the Petitioner's claims, and, further, there is no substantial federal question not previously decided by this Court. Additionally, the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

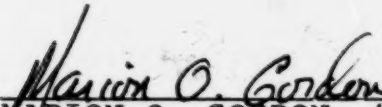


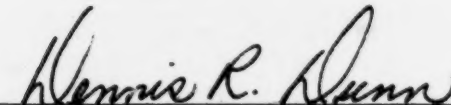
---

WILLIAM B. HILL, JR.  
Senior Assistant  
Attorney General  
Counsel of Record  
For Respondent

MICHAEL J. BOWERS  
Attorney General

JAMES P. GOOGE, JR.  
Executive Assistant  
Attorney General

  
MARION O. GORDON  
First Assistant  
Attorney General

  
DENNIS R. DUNN  
Senior Attorney

Please Serve:

WILLIAM B. HILL, JR.  
Senior Assistant Attorney General  
132 State Judicial Building  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334  
(404) 656-3359

## CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR. a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage to:

G. Alan Blackburn  
Attorney At Law  
4205 Roswell Road, N.E.  
Atlanta, Georgia 30342

(Additional service on next page)

and to:

Honorable John T. Strauss  
District Attorney  
Alcovy Judicial Circuit  
Newton County Courthouse  
Covington, Georgia 30209

This 5<sup>th</sup> day of June, 1984.

  
\_\_\_\_\_  
WILLIAM B. HILL, JR.